

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

Not Restricted

S CR 2018 0032

DIRECTOR OF PUBLIC PROSECUTIONS

v

JOSEPH ESMALI

JUDGE: HOLLINGWORTH J

WHERE HELD: Melbourne

DATE OF HEARING: 22-26, 29-31 October; 1-2, 7-9, 12-14, 16, 19-21 November 2018; 1, 29 March 2019

DATE OF SENTENCE: 17 April 2019

CASE MAY BE CITED AS: DPP v Esmaili

MEDIUM NEUTRAL CITATION: [2019] VSC 218

CRIMINAL LAW - Sentence - Manslaughter - Single strike or punch to the head or neck - Statutory minimum non-parole period applicable - No 'special reason' established - Sentenced to 10 years and 6 months' imprisonment, with a non-parole period of 10 years

APPEARANCES:

Counsel

Solicitors

For the DPP

Mr B Kissane QC with
Mr J McWilliams

Solicitor for Public
Prosecutions

For Mr Esmaili

Mr J Desmond

Doogue & George

HER HONOUR:

- 1 Joseph Esmaili, you have been found guilty by a jury of the manslaughter of Patrick Pritzwald-Stegmann. Mr Pritzwald-Stegmann died on the 28th of June 2017, as a result of injuries which you inflicted on the 30th of May 2017.
- 2 On the evening of the 30th of May, you met your friend, Corey Rogers, and his girlfriend, at the Box Hill Hospital. Your friends were part of a larger group of people who were visiting a patient at the hospital. After you and the rest of your group left the hospital, you gathered near the hospital doors at the Arnold Street exit.
- 3 Mr Pritzwald-Stegmann was a surgeon who worked at the hospital. As he left via the Arnold Street exit, after his shift, he saw members of your group smoking in what was clearly signposted as a non-smoking area. He told one of the people in your group, Leigh Clayton, that they shouldn't be smoking there, and he was going to let security know. Ms Clayton told him to 'fuck off.' You were not involved in that particular exchange.
- 4 What happened thereafter was captured on CCTV cameras, and witnessed by hospital staff and visitors.
- 5 Shortly after the exchange outside, you walked back into the hospital and turned left, heading in the direction of the public toilets. Mr Pritzwald-Stegmann re-entered the hospital, only a few steps behind you. As he walked towards the reception staff at the front counter, he told them to call security to move the smokers away from the entrance. As you walked through the foyer area, you overheard what Mr Pritzwald-Stegmann was saying to the reception staff. You stopped, turned in his direction, and called out 'Why don't you go fuck yourself?'
- 6 Mr Pritzwald-Stegmann left the reception desk and moved towards you, identifying himself as a staff member, and saying that you couldn't talk to him like that. He said you needed to leave the hospital. You walked back towards him and replied 'Yeah,

whatever, fuck off,' before turning and walking towards the toilets. Both of you can be seen gesturing with your arms in the direction of the exit during this exchange.

- 7 Mr Pritzwald-Stegmann followed you into the lift lobby area. You turned around and walked right up close to him, in a physically aggressive manner. He pointed again in the direction of the exit. He told you that you needed to leave the hospital, and he would escort you out. You replied 'I need you to suck my dick.'
- 8 At trial, there was a dispute as to whether you deliberately spat in his face at that time, or whether you might have unintentionally let some spittle fly. Whether or not you spat at him deliberately, Mr Pritzwald-Stegmann clearly thought you did; thereafter, he complained, angrily and repeatedly, about you having spat at him.
- 9 You turned and continued walking towards the toilets. Mr Pritzwald-Stegmann followed you again, still gesturing in the direction of the exit. Once again, you turned around, walked back to him, and stood right in front of him. You continued to yell angrily in his face.
- 10 You then turned and walked away, towards the toilets. Mr Pritzwald-Stegmann continued to follow you, still demanding in a raised voice that you leave the hospital, and complaining that you had spat on him. You turned around and walked up to him, in what would be the final confrontation between the two of you.
- 11 After you walked up and stood very close to him, Mr Pritzwald-Stegmann removed the bag he was carrying on his shoulder and put it on the floor. You were both arguing loudly and aggressively. Shortly after putting his bag down, he put his right arm out in your direction, in a defensive gesture that seemed to be trying to stop you from standing too close to him. You looked and gestured with your right arm in the direction of the toilets, and then put both your hands behind your back.
- 12 Suddenly, and without warning, you pulled your right hand out from behind your back, and punched him with a clenched fist to the head. You hit him with sufficient

force to knock him unconscious. He fell straight to the floor, without any attempt to break his fall. When his head hit the floor, Mr Pritzwald-Stegmann sustained the catastrophic brain injuries which led to his eventual death.

- 13 You left the scene immediately, without checking the welfare of Mr Pritzwald-Stegmann, who was lying unconscious on the floor.
- 14 You and your friends ran from the hospital, to one of their cars, which was parked on a nearby street. You stayed the night at Corey Rogers' home. The following day, you returned home to your father's house. You were arrested and interviewed by police on the evening of the 31st of May.
- 15 After he was punched, Mr Pritzwald-Stegmann remained unconscious on the floor. Medical staff attended the foyer area and treated him immediately. He was taken to the emergency department, before being transferred to The Alfred Hospital, where he underwent two separate surgeries to try to relieve the pressure on his brain.
- 16 Mr Pritzwald-Stegmann was placed in a medically-induced coma, but did not respond to treatment. Over the following weeks, medical staff continued to treat and monitor him, but his condition did not improve significantly. Several meetings were held between Mr Pritzwald-Stegmann's family and the treating doctors, to discuss future treatment options and his prognosis. Eventually, Mr Pritzwald-Stegmann's family made the difficult decision to cease the artificial treatment that was keeping him alive.
- 17 The confrontation between the two of you arose spontaneously, and these events took place within a very short period of time – approximately two minutes passed between you entering the hospital to go to the toilet, and you leaving the hospital after hitting Mr Pritzwald-Stegmann.
- 18 You started the confrontation, by yelling abuse at Mr Pritzwald-Stegmann as he spoke to reception staff about your group smoking in the no-smoking area. Thereafter, you continued to swear at and abuse him, as he repeatedly asked you to leave the hospital.

The verbal exchanges between the two of you became louder and more aggressive, as time went on. Several times, you turned to walk away; each time, Mr Pritzwald-Stegmann followed you, continuing to insist that you leave the hospital. Each time he did that, you turned back and went and stood close to him, yelling angrily in his face. Unfortunately, neither of you was prepared to simply walk away from the argument.

- 19 Immediately before hitting him, you had put both your hands behind your back. Your clenched fist appeared suddenly from behind your back, without any verbal or physical warning that you were going to punch Mr Pritzwald-Stegmann.
- 20 In finding you guilty of manslaughter, the jury clearly rejected your claim that you punched Mr Pritzwald-Stegmann in self-defence.
- 21 Before I consider your personal circumstances, I want to say something about the effect your actions have had on others.
- 22 Patrick Pritzwald-Stegmann was born in Germany in 1976. When he was 11, his family moved to New Zealand. He studied medicine and started his professional career in New Zealand. In 2007, he married Christine Baumberg. In 2009, they moved to Melbourne, where he began his cardiothoracic training. After completing his specialist training, he worked at a number of hospitals; he started consulting at the Box Hill Hospital in 2013.
- 23 His death has devastated his entire family and turned their lives upside down, mentally, emotionally, physically and financially.
- 24 Visiting him in intensive care over the four week period after the incident, when he was motionless and attached to noisy and intrusive machines, was extremely difficult for his wife and twin daughters, who were only five years old at the time. Attending family conferences with the medical team, making the ultimate decision to turn off life support, and then waiting for him to die, are particularly painful memories for Ms Baumberg.

25 The trial process was also traumatic for them, in particular because you accepted no responsibility, and continued to blame Mr Pritzwald-Stegmann, for what happened at the hospital. Mr Pritzwald-Stegmann's family behaved with extraordinary dignity and restraint, as they sat and listened to a defence case that would have been challenging for any victim's family to endure.

26 After more than 15 years of training, Mr Pritzwald-Stegmann had become one of a relatively small number of cardiothoracic surgeons in Australia. He was hard-working, passionate about his vocation, and determined to be the best doctor he could be. His untimely death at the age of 41 has affected his many patients and colleagues, both at the Box Hill Hospital and in the wider medical community.

27 I turn to consider your personal circumstances. You were born in October 1994 in Perth, and are now 24 years old. Your parents separated acrimoniously when you were young, and you moved frequently between their two households and different schools. When you were about 15, you moved with your father to live in Melbourne. A few years later, you moved back to Perth. Shortly before this incident, you had moved back east. In May 2017, you were living with your father and step-mother in Mill Park.

28 For the purposes of sentencing, you were assessed by Luke Armstrong, a consultant psychologist. You have described your father as a long term drug abuser, who had a quick and violent temper. You gave an account of a childhood dominated by the physical and emotional violence of your father and your older sister. You told Mr Armstrong that you displayed early conduct problems, antisocial behaviour, and problems regulating your emotions. You said that your upbringing made you hyper-vigilant, and prone to retaliate in any situation that you perceived may escalate to violence. Although you did not retaliate to your father's abusive behaviour, you said you were frequently in fights with your peers, and learned to not back down. You told him you had been hit in the face approximately 200 times.

29 You started abusing drugs and alcohol in your early teens. By the time you were 17 or 18, you were regularly abusing cannabis, alcohol and methamphetamine (or 'ice'). You subsequently started using heroin.

30 You left school at the end of year 10. Since then, you have been unable to complete further education, or hold down steady employment.

31 Mr Armstrong administered several psychological tests on you. He assessed your intelligence as being in the average range. Although you have some symptoms of both Anti-Social Personality Disorder and Borderline Disorder, you do not have sufficient symptoms to justify a diagnosis of either of those disorders. Rather, Mr Armstrong diagnosed you as having something called 'Other Specified Personality Disorder'. He believed that, as a result of your upbringing, when faced by external threats to your wellbeing or survival, you immediately and unconsciously lash out in response.

32 Mr Armstrong also diagnosed you as having a Severe Substance Abuse Disorder for each of alcohol, opioids and cannabis. You are currently on a Methadone program in custody.

33 Each of these disorders are defined as Mental Disorders in the current version of the Diagnostic and Statistical Manual of Mental Disorders ('DSM 5').

34 Based on the account of the offending which you gave to Mr Armstrong, he expressed the opinion that your personality disorder contributed causally to the offending in the following ways:

- (a) By impairing your ability to exercise appropriate judgment. You perceived that you were at risk of imminent harm and lashed out as a matter of survival;
- (b) By impairing your ability to make calm and rational choices or think clearly, at a time when you experienced an imminent sense of danger; and

(c) By impairing your ability to appreciate the wrongfulness of your conduct.

35 There was no evidence at trial that you had consumed alcohol or drugs prior to the offending, or that you appeared substance-affected. However, you reported to Mr Armstrong that you had consumed at least 4 drinks on the night of the offence, and your blood alcohol level would have been in excess of .05. You also told him that you had been trying to cut down on your drug usage at that time, limiting your use to evenings. Based on that account, Mr Armstrong expressed the opinion that your ongoing, untreated substance abuse problems, including 'features of intoxication and/or withdrawal from a number of substances' contributed to impairment of your judgment at the time of offending, by magnifying your anger, frustration, intolerance and agitation.

36 The account of your history that you gave to Mr Armstrong does not reconcile easily with the contents of the 20 character references filed on your behalf, almost all of which are from members of your immediate or extended family. Although it is not uncommon for character references to try to paint a positive picture of the offender, it is rare for them to differ so markedly from the other evidence. A few of the referees did describe you as being a little misdirected or misguided on occasion, or as having made some wrong decisions in life, and one spoke of you as having had a 'less than desirable upbringing.' But your referees overwhelmingly described you in terms such as kind, caring, helpful, gentle, respectful, courteous, patient, easy-going and relaxed, someone who is not quick to anger. They described your offending as being completely out of character.

37 Even allowing for the fact that family members may not be aware of every aspect of an offender's life, and may look for the best in their loved ones, their glowing accounts do not sit easily with Mr Armstrong's assessment of you as somebody who has severe antisocial personality traits, displays inappropriately intense anger, and has severe problems regulating emotions – all arising from a profoundly disturbed childhood.

38 That said, I accept that you do enjoy the support of an extended family, which will be important for your rehabilitation when you are eventually released.

39 You have displayed some remorse. In your record of interview, you said that Mr Pritzwald-Stegmann had kept 'pressuring' you, and you had punched him because you 'couldn't handle things like that very well'. You did not tell the police that you were acting in self-defence. Your demeanour during that interview did appear to demonstrate genuine remorse. You also said how sorry you were for the injury you had caused, and that you would accept the consequences because you were responsible for what had happened. But your demeanour in the witness box was quite different: you repeatedly and adamantly blamed Mr Pritzwald-Stegmann for what happened, in the course of saying you were only acting in self-defence. Whilst I accept that you do have some regrets about what happened, you still have some way to go before you genuinely accept full responsibility for your actions that day.

40 I turn to consider the relevance of the fact that you were 22 years old at the time of offending. The law says that the youth of an offender should be a primary consideration for a sentencing court where the matter properly arises. In the case of such an offender, rehabilitation is usually far more important than general deterrence; rehabilitation benefits the community as well as the offender.

41 However, those principles have little application in the case of someone like you, who has numerous prior convictions. Between May 2013 and October 2014, you were convicted of more than 40 offences in Victoria, most of which were property-related. You were also convicted of four minor offences in Western Australia in 2016 and 2017. Most of your prior offences did not involve violence.

42 However, you do have several convictions for breaching community correction orders and for committing indictable offences whilst on bail, which demonstrate a disregard for the law and for previous opportunities for rehabilitation. In sentencing you in July 2014, for contravening a community correction order which had been imposed in

respect of an armed robbery,¹ Judge Chettle warned you that you had reached a point in your life where, unless you began to 'straighten up', you were going to find yourself in adult custody for greater periods of time.² Unfortunately, you have continued to offend further since then, notwithstanding subsequent sentences of imprisonment.

43 You killed Mr Pritzwald-Stegmann whilst you were on bail in relation to some theft and property charges. You have pleaded guilty in this court to a summary charge of committing an indictable offence whilst on bail, and I am required to sentence you in relation to that charge as well as the manslaughter charge.

44 There is no dispute that the maximum penalty for manslaughter is 20 years' imprisonment. But there is a dispute as to whether minimum non-parole period provisions, which were introduced into the *Sentencing Act 1991* in 2014, apply in this case. Where the relevant section (s 9C) applies, the court must impose a non-parole period of not less than 10 years ('the statutory minimum'), unless the court finds under s 10A that a 'special reason' exists.

45 Because this is the first case in which a judge has been required to consider the statutory minimum provisions in the context of manslaughter by a single punch or strike, it is necessary for me to discuss the law in more detail than I might otherwise do in the course of sentencing remarks.

46 By a notice dated the 8th of June 2018, the prosecution indicated their intention to seek the statutory minimum; that notice has not been revoked under s 9A(8).

47 The statutory minimum will apply in this case only if I am satisfied beyond reasonable doubt of the following four matters:

(a) First, that Mr Pritzwald-Stegmann's death was caused by a punch to any part of his head or neck that, by itself, caused an injury to his head or neck;

¹ *DPP v Esmaili* [2014] VCC.

² At [3].

- (b) Secondly, that you intended that the punch be delivered to Mr Pritzwald-Stegmann's head or neck;
- (c) Thirdly, that Mr Pritzwald-Stegmann was not expecting to be punched by you; and
- (d) Fourthly, that you knew that Mr Pritzwald-Stegmann was not expecting, or was probably not expecting, to be punched by you.

48 In considering the third and fourth matters, there are two further provisions that need to be borne in mind. A court may be satisfied of those matters even if the victim was involved in a confrontation with the offender before the punch was delivered (s 9C(4)). Further, the fact that an offender warns the victim of the punch immediately before delivering it does not mean that the victim is expecting to be punched (s 9C(5)).

49 I have no trouble being satisfied beyond reasonable doubt as to the first two of those matters:

- (a) Given the way the prosecution ran their case, the jury must have been satisfied that you did punch Mr Pritzwald-Stegmann's head. That punch clearly caused an injury to his head, by rendering him immediately unconscious; and
- (b) I am also satisfied that you intended to punch Mr Pritzwald-Stegmann's head. You were standing directly in front of him, facing him, with your eyes open. You swung your fist directly towards his head. There was no movement by either of you that might have rendered the contact with his head unintentional.

50 The third matter I must consider is whether Mr Pritzwald-Stegmann was 'expecting' to be punched. The legislation is not limited to those cases where the victim is hit from behind or from the side; a person who is punched or struck from the front may also not be expecting to be hit. Although you had been loud and abusive throughout your interactions with Mr Pritzwald-Stegmann, you had given him no verbal warning of the possibility of physical violence at any stage of the confrontation. Nor had you

done anything physical that might have caused him to expect that you were about to hit him. In fact, immediately before you did hit him, you put both hands behind your back, in an apparently non-threatening gesture. His earlier defensive gesture of putting his right arm out towards you – to make some space, and stop you from getting ‘in his face’ and spitting at him again – does not indicate that he was expecting to be punched. The fact that he did not seek assistance from security is also consistent with his believing that he was dealing with an insolent, disrespectful ‘loud-mouth’, not with someone who was likely to turn physically violent. For those reasons, I am satisfied that Mr Pritzwald-Stegmann was not expecting to be punched by you.

- 51 The fourth matter I must consider is whether you knew that he was not expecting, or probably not expecting, to be hit by you.
- 52 By the time you punched Mr Pritzwald-Stegmann, you knew that he was a member of the hospital staff, who was trying to get you to leave the hospital. You had not warned him verbally that you would hit him, if he didn’t stop following or annoying you. At no stage did Mr Pritzwald-Stegmann say anything, or adopt any position, that suggested he thought he might be hit by you.
- 53 In your evidence, you said you punched him first, because you thought he was about to punch you. That differed from what you told police, namely, that you punched him because you could not cope with him pressuring you to leave the hospital. Whatever your true reason was for punching him, you had done nothing to indicate that you were about to punch him at that time. On the contrary, just before you put your hands behind your back, you had been pointing in the direction of the toilets and looking away; you then put your hands behind your back in an apparently non-threatening gesture.
- 54 In all the circumstances, I am satisfied that when you pulled your right arm out from behind your back, quickly and forcefully, you were well aware that he was probably not expecting to be punched by you at that moment.

55 It follows that I am satisfied beyond reasonable doubt that you fall within the terms of s 9C. It is then necessary for me to consider whether you have established that a special reason exists, such that I should not impose the statutory minimum.

56 Section 10A sets out a number of matters that may amount to a special reason. You rely on two of those matters: impaired mental functioning, and the existence of substantial and compelling circumstances.

57 Special reason may be established if, at the time of the commission of the offence, an offender has 'impaired mental functioning' that is causally linked to the commission of the offence and substantially reduces the offender's culpability (s 10A(2)(c)(i)). 'Impaired mental functioning' is defined in s 10A(1), and relevantly includes 'a mental illness within the meaning of the *Mental Health Act 2014*'. Section 4 of the *Mental Health Act 2014* relevantly defines a mental illness as 'a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory.'

58 Your counsel argued that your personality disorder falls within that definition. Mr Armstrong's evidence was that your personality disorder did involve significant disturbances of thought and mood, but that is only one part of the definition of a mental illness. Importantly, a personality disorder is not 'a medical condition'.³ I reject your argument that because personality disorders are listed in the DSM5, that means they are medical conditions.

59 It follows that I am not persuaded on the balance of probabilities that a special reason has been established on the impaired mental functioning ground.

60 A special reason may also be established if there are 'substantial and compelling circumstances that are exceptional and rare and that justify doing so' (s 10A(2)(e)).

61 In determining whether there are such substantial and compelling circumstances, s 10A(3)(aa) explicitly requires me to have regard to Parliament's intention that a non-

³ In so far as he purported to do so, Mr Armstrong is not qualified to express an opinion about medical matters or matters of statutory construction.

parole period of not less than 10 years should ordinarily be fixed in a case falling under s 9C(2).

62 The Court of Appeal has said that 'compelling' connotes powerful circumstances of a kind wholly outside what might be described as 'run of the mill' factors, typically present in offending of the relevant kind.⁴ The Court of Appeal has also observed that Parliament clearly intended that the burden imposed upon an offender who seeks to escape the operation of the mandatory minimum provisions should be a heavy one – not one capable of being lightly discharged.⁵

63 The only matters that were put forward as being substantial and compelling circumstances in your case were your personality disorder, and the circumstances of the offending (particularly the fact that you felt provoked by what you perceived to be Mr Pritzwald-Stegmann's aggression). Having regard to the high benchmark set by s 10A, I am not persuaded that those matters are sufficient to amount to substantial and compelling circumstances.

64 Accordingly, I am not persuaded that you have established a special reason why the statutory minimum does not apply. I am therefore bound to impose a non-parole period of not less than 10 years.

65 The question that then arises is what the appropriate head sentence should be for manslaughter. The statutory minimum provisions are silent as to what the head sentence should be in a case where a statutory minimum applies; they are concerned only with the non-parole period. The only other relevant provision is s 11(3) of the Sentencing Act, which provides that any non-parole period must be at least six months less than the total term of the sentence.

66 The parties agree that I am required to set the head sentence by reference to the instinctive synthesis process by which judges ordinarily set sentences.

⁴ *DPP v Hudgson* [2016] VSCA 254 at [112].

⁵ *Ibid* at [111].

67 Having regard to the circumstances of the offending, your personal circumstances, and general sentencing principles, for the offence of manslaughter I sentence you to 10 years and 6 months' imprisonment.

68 For the summary offence of committing an indictable offence whilst on bail, I sentence you to one month's imprisonment. I order that that sentence be served wholly concurrently with the manslaughter sentence. That makes a total effective sentence of 10 years and 6 months' imprisonment.

69 The period before you will become eligible for parole is 10 years.

70 Further, I declare that the period to be reckoned as already served under this sentence is 672 days, not including today's date. I direct that there be noted in the records of the court the fact that such declaration was made and its details.

CERTIFICATE

I certify that this and the 13 preceding pages are a true copy of the reasons for sentence of Hollingworth J of the Supreme Court of Victoria delivered on 17 April 2019.

DATED this seventeenth day of April 2019.

ahmed esmaili
Associate

